Supreme Court, U.S.
FILED
FEB 12 1992
OFFICE OF THE CLERK

(2)

NO. 91-1190

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF ARIZONA,

Petitioner,

vs.

TIMOTHY PRICE QUINTON, Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE ARIZONA COURT OF APPEALS CORRECTLY INTERPRET CONSTITUTIONAL LAW WHEN IT HELD THAT THE PROSECUTION OF THIS MURDER CHARGE VIOLATED QUINTON'S DOUBLE JEOPARDY RIGHTS, IN APPLYING GRADY V. CORBIN?

II. SHOULD THIS COURT ACCEPT CERTIORARI IN THIS MATTER IN ORDER TO DETERMINE WHETHER GRADY V. CORBIN SHOULD BE OVERRULED?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASE AND AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENTS REASONS FOR DENYING THE WRIT	
I. THE ARIZONA COURT OF APPEALS CORRECTLY INTERPRETED FEDERAL CONSTITUTIONAL LAW IN APPLYING GRADY V. CORBIN TO THIS CASE, AND FINDING THAT THE PROSECUTION OF THIS MURDEF CHARGE VIOLATES THE FIFTH AMENDMENT'S PROHIBITION AGAINST DOUBLE JEOPARDY.	4
II. MOST COURTS HAVE CORRECTLY APPLIED THE GRADY ANALYSIS TO DOUBLE JEOPARDY CLAIMS. THE RESULTS HAVE BEEN FACT SPECIFIC, AND OCCASIONAL DENIALS OF DOUBLE JEOPARDY PROTECTION DO NOT CREATE A CONFLICT BETWEEN JURISDICTIONS WHICH NECESSITATES A REVERSAL OF GRADY V. CORBIN.	7
A. THE GRADY V. CORBIN DECISION IS A NATURAL PROGRESSION OF 20 YEARS OF SOLID CASE LAW WHICH CORRECTLY INTERPRETS THE DOUBLE JEOPARDY CLAUSE AND SHOULD NOT BE OVERRULED.	7
B. THE NATURE OF DOUBLE JEOPARDY ANALYSIS IS FACT BASED AND THE OCCASIONAL DENIALS OF DOUBLE JEOPARDY PROTECTION DO NOT OF THEMSELVES CREATE A CONFLICT AMONG JURISDICTIONS WHICH WOULD NECESSITATE OVERRULING GRADY V. CORBIN.	10
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Ashe v. Swenson, 397 U.S. 436 (1970)	8,9
Blockburger v. United States, 284 U.S. 299 (1932)	8,13
Breed v. Jones, 421 U.S. 1779 (1975)	11
Brown v. Ohio, 432 U.S. 161,___ S. Ct. ___, 53 L. Ed. 2d 187 (1977)	6,9
Grady v. Corbin, 495 U.S. ___, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990)	Throughout
Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 6, 2912, 53 L. Ed. 2d 1054 (1977)	9
Illinois v. Vitale, 447 U.S. 410, 100 S. Ct.6, 2260, 65 L. Ed. 2d 1054 (1980)	9
Miranda v. Arizona, 385 U.S. 436, 86 S. Ct. 1602 (1966)	14
Rinaldi v. United States, 434 U.S. 22 (1977)	11
United States v. Bendis, 681 F. 2d 561 (9th Cir.1981)	12
United States v. Bey, 736 F. 2d 891(3rd Cir. 1984)	11
United States Constitution	
Fifth Amendment	Throughout
Fourteenth Amendment	7

STATEMENT OF THE CASE

On May 17, 1990, a grand jury sitting in Mohave County Arizona indicted Timothy Price Quinton on a charge of first degree murder. The charge was based on an incident in which it was reported that seven year old Rebecca Lanning failed to return to the parking lot where she was camped with her mother, two brothers and two adult males in September of 1989. her body was found 17 days later.

Respondent Quinton had been indicted in October of 1990 on charges of kidnapping and custodial interference based on the same incident. His family had retained an attorney to represent him in that case.

The trial on the kidnapping and custodial interference charges was set to begin on June 4, 1990. Quinton's retained counsel in the kidnapping case announced that they would not represent him on the new murder indictment. The Mohave County Legal Defender's office was appointed to represent him on the new indictment.

On June 4, 1990, the kidnapping trial began. No motion to consolidate had been filed in the trial court regarding these indictments. No waiver of double jeopardy claims was filed by the defendant. It is apparent that the

county attorney's office may have had some concern about the possibility of a double jeopardy problem, because the prosecutor informally contacted counsel to see whether they would agree to consolidate the indictments and go to trial on June 4. (Appendix,at A-7-8.)

The prosecutor chose not to formally move to consolidate, because he wanted to try the case on June 4, 1990, for tactical reasons, (Appendix, at A-22.) and conceded at the motion to dismiss hearing that filing a formal motion to consolidate at that late date would have had the practical effect of continuing the trial past the start date that the prosecutor desired. (Appendix, at A-22.)

Quinton was convicted at the kidnapping trial and sentenced to 22 years in prison on the kidnapping charge, with no eligibility for parole, and 8 years for custodial interference, to be served consecutively to the kidnapping charge. Quinton then filed a motion to dismiss the murder charge on double jeopardy grounds, relying in great part on Grady v. Corbin, 495 U.S. ___, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).

At the hearing on the motion to dismiss, the prosecutor conceded that the state did not have a theory of prosecution that differed from the presentation of evidence at the first (kidnapping) trial . As the trial court put it,

"this murder trial, if it goes on, is going to be the same as last time except the judge goes through and pulls out the -- puts in a murder instruction, takes out the one defining custodial interference and kidnapping." To which the state essentially agreed. (Appendix, A-21.)

The trial court denied the motion to dismiss, but the Arizona Court of Appeals reversed. (See Petition for Writ of Certiorari, Appendix A.) Based on the record below, the Court of Appeals concluded that, because the state had conceded that it would rely on the same conduct to prove the offenses charged in the both trials, double jeopardy had attached. [Petition for Writ of Cert., Appendix, A-25] The Arizona Supreme Court denied review in an order dated September 13, 1991 (See Petition for Writ of Cert., Appendix B.)

The completed Petition for Writ of Certiorari was received by the undersigned counsel of record on January 13, 1992.

ARGUMENT

I. THE ARIZONA COURT OF APPEALS CORRECTLY INTERPRETED FEDERAL CONSTITUTIONAL LAW IN APPLYING GRADY V. CORBIN TO THIS CASE, AND FINDING THAT THE PROSECUTION OF THE MURDER CHARGE VIOLATES THE FIFTH AMENDMENT'S PROHIBITION AGAINST DOUBLE JEOPARDY.

The Arizona Court of Appeals correctly decided that the state's prosecution of this murder charge was based on the same conduct that it relied on to convict him of kidnapping in the previous trial. The Petitioner concedes that the state of Arizona would be precluded from trying the murder case on a felony murder theory (Petition for Writ of Cert., p. 21,) where the underlying theory was kidnapping. While Respondent agrees with petitioner in this regard, that analysis does not go far enough.

The state's theory at the kidnapping trial was that Quinton took Lanning with the intent to kill her. No evidence was presented at that trial which would suggest any of the other statutory purposes of kidnapping. (Petition for Writ of Cert., p.5)

No evidence was presented, nor could it be presented, that any of the other statutory

offenses which could be the basis for a felony murder theory existed. [Id., pp. 4-5.]

Without felony murder to rely on, the state must prove premeditation, in order to obtain a conviction for first degree murder. The state presented evidence of the conduct it will rely on to show premeditation to the kidnapping jury as an element of that offense. (The state proved that Quinton took the girl with intent to kill her by proving that she was dead.) Premeditation, which the state incorporated into its proof on the kidnapping charge, was an essential element of that offense, and of first degree murder by premeditation.

Because the state's case in the kidnapping trial relied on circumstantial evidence, the state was required to prove the statutory intent for the kidnap with evidence that Lanning (a) was dead, and (b) was found in circumstances which suggest the death was not from natural causes. No cause of death was ever established. In doing so, the state incorporated conduct constituting the elements of the murder charge into its proof of the elements of the kidnapping charge. Like Grady v. Corbin, 495 U.S. ___, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), where the state sought to rely on the evidence that the defendant's car swerved over the center line to prove elements

of its homicide charge, the state here sought to rely on the allegation that Lanning was murdered to support its kidnapping charge.

The order of the prosecutions is not important to the issue of whether the double jeopardy clause is violated. Brown v. Ohio, 432 U.S. 161, ___ S. Ct. ___, 53 L. Ed. 2d 187 (1977). The double jeopardy clause bars a second prosecution whenever, in order to prove the charges in the latter case, the government must prove conduct which constituted an element of a crime for which the defendant has already been convicted. Illinois v. Vitale, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980).

Had the order of trials been reversed, and the presentation of the state's case gone forward as indicated by the state's concession at the motion to dismiss (Appendix A-21), the state would be precluded from trying Quinton for the kidnapping, because the state would be required to prove at the kidnapping trial that Lanning was taken with the intent to kill her. This order of proceeding would have violated double jeopardy because the double jeopardy clause prohibits prosecution for a lesser crime after conviction of the more serious offense, Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

Because the state, in order to establish an essential element of the offense of first

degree murder, must prove conduct for which Quinton has already been prosecuted, a trial would violate Quinton's Fifth and Fourteenth amendment right to be protected against double jeopardy. The Arizona Court of Appeals correctly analyzed this case in light of this court's decision in Grady, and so we respectfully request that this court decline to accept this Petition for Writ of Certiorari.

II. MOST COURTS HAVE CORRECTLY APPLIED THE GRADY ANALYSIS TO DOUBLE JEOPARDY CLAIMS. THE RESULTS HAVE BEEN FACT SPECIFIC, AND OCCASIONAL FACT-BASED DENIALS OF DOUBLE JEOPARDY PROTECTION DO NOT CREATE A CONFLICT BETWEEN JURISDICTIONS WHICH NECESSITATES A REVERSAL OF GRADY V. CORBIN AND ITS PREDECESSORS.

A. The Grady v. Corbin decision is a natural progression of 20 years of solid case law which correctly interprets the Double Jeopardy Clause and should not be overruled.

Petitioner argues that this court should grant certiorari in this case in order to overrule Grady v. Corbin. This request appears to be based on the perception by petitioner that the Grady decision "is inconsistent with longstanding historical evidence and judicial case law, and has resulted in inconsistent, unjust, and absurd results in other cases."

(Petition for Writ of Certiorari, p.24.) The Petitioner asks that the court overrule Grady and reinstate the test announced in Blockburger v. United States, 284 U.S. 299, ___S. Ct.___, ___L. Ed. ___(1932), as the sole factors to consider in deciding which successive prosecutions constitute placing an accused twice in jeopardy for the same conduct.

Petitioner assumes that, prior to the Grady decision, the courts considered double jeopardy claims solely in the light of the "identical elements" test in Blockburger. But as early as 1970, in the case of Ashe v. Swenson, 397 U.S. 436, ___S. Ct.___, ___L. Ed. 2d___(1970), the court has been considering just what falls under the prohibition, using Blockburger as a starting, not an ending, point. This type of analysis is continued in Grady, which clearly enunciates that, in conducting a double jeopardy analysis, Blockburger is the first part of the analysis, followed by further considerations.

These further considerations are not novel, but rather had been evolving for two decades. First, the court ruled in Ashe that the double jeopardy clause prohibits the government from relitigating the same factual issues regarding conduct and identity in a second trial after the first trial resulted in acquittal. The court was concerned, in part,

that the prosecutors had considered the first trial a "dry run", and hoped that a second trial would enable them to obtain the conviction which had eluded them in the first trial. Ashe v. Swenson, 397 U.S., at 477.

In 1977, the court decided two cases in which it further explored the double jeopardy issue. In Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187, the court ruled that even in cases where two offenses are sufficiently different to allow a court to impose consecutive sentences if tried together, successive prosecutions may still be barred where the second trial would relitigate factual issues resolved in the first. In Harris v. Oklahoma, 433 U.S. 682, as noted above, the sequence of prosecutions was held to be immaterial. The court there ruled that it makes no difference whether the first case tried dealt with the greater of lesser charge.

Then, in Illinois v. Vitale, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980), the court clearly indicated the course along which double jeopardy analysis would continue. In Vitale, the court indicated that a fact-based analysis of the charges and the proof which would be introduced in an attempt to prove them was essential to determining whether or not the defendant had raised a valid double jeopardy claim. Id., 447 U.S., at 421. The rationale

behind the holding in that case was that if, in order to prove a charge in the later case, the state must prove conduct that constitutes an offense for which the defendant was already convicted, double jeopardy bars the later prosecution.

This generation of cases formed the basis for the explicit holding in Grady which Petitioner seeks to have overturned. The result Petitioner seeks, however, of giving the government unlimited "dry runs" in prosecuting defendants, merely by renaming the charges against them, violates the spirit and the letter of the Fifth Amendment's double jeopardy protections. If accused persons are still to be able to look to the protection of the Bill of Rights to protect them from these unconstitutional successive prosecutions, Grady v. Corbin and its predecessors must remain intact.

B. The nature of double jeopardy analysis is fact-based, and the occasional denials of double jeopardy protection do not of themselves create a conflict among jurisdictions which would necessitate overruling Grady v. Corbin.

Petitioner's argument that the Grady decision has caused courts to reach inconsistent, unjust and absurd results ignores the fact-based inquiry necessary to double jeopardy analysis. Respondent does not wish to

rehash Petitioner's discussion of each of the various cases, and, without presuming to pass judgment on the decisions of the various courts cited in the Petition, merely points out to the court that certain factual situations evoke exceptions to the double jeopardy clause which have nothing to do with the validity of Grady v. Corbin.

For example, double jeopardy protections have historically only covered successive criminal prosecutions. The protection does not apply to a civil/criminal scenario. Breed v. Jones, 421 U.S. 1779 (1975). With certain policy exceptions [See Petite v. United States, 361 U.S. 529, 530 S. Ct. 450 (1960)], the doctrine of dual sovereignty allows successive state and federal prosecutions without violating double jeopardy provisions. Rinaldi v. United States, 434 U.S. 22 (1977).

Conspiracy prosecutions in which proof of an overt act is not required may not violate double jeopardy prohibitions after conviction of the defendant for a related substantive offense. Unites States v. Bey, 736 F. 2d 891 (3rd Cir. 1984.) It is possible that some of the cases cited by petitioner may be justified by reliance on these separate rationales for their apparent deviance from the double jeopardy analysis set forth in Grady.

Because the nature of double jeopardy analysis is fact-based, once the defendant has raised a non-frivolous claim of former jeopardy, it is up to the government to present evidence to the court indicating that separate conduct is charged. United States v. Bendis, 681 F.2d 561 (9th Cir. 1981.) Where the government can overcome this hurdle, a double jeopardy claim will not be successful. Further, nothing in Grady prohibits prosecutors from joining charges into a single prosecution. Where prosecuting agencies exercise foresight and control over their cases, double jeopardy claims will rarely be successful. For the forgoing reasons, certiorari should not be granted for the purpose of overruling Grady v. Corbin.

CONCLUSION

The Arizona Court of Appeals correctly decided that the prosecution of this murder charge violated Respondent's right to be free from double jeopardy. The state had conceded that the conduct which would be presented to the jury in the murder case was virtually identical to the conduct presented to obtain the kidnapping conviction in the first case, making the kidnapping trial, in essence, a "dry run" for the murder prosecution. Because the appellate court below correctly applied double jeopardy principles in dismissing the murder prosecution, this court should deny the Petition for a Writ of Certiorari in this case.

Further, the current state of double jeopardy law, as announced in Grady v. Corbin, does not constitute a radical deviation from established constitutional principles, but rather is the result of a generation-long evolution in the interpretation of the double jeopardy clause, and the long-standing principles first announced in Blockburger. Because it relies on a case by case, fact-based determination, there may be different results in application to different types of cases. Grady does not necessarily negate all prior exceptions to a successful plea of former

jeopardy, and there is no indication in Grady that those exceptions are not still valid concerns for a court when a double jeopardy claim is placed before it.

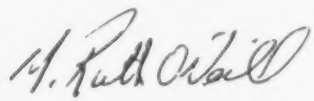
Finally, there is no real threat that the current interpretations of the double jeopardy clause will result in mass injustice by vacating cases which the government feels must be pursued in the interests of justice. The remedy to this possible scenario is for prosecutors to "do their homework" and prevent situations from arising where a defendant may validly raise a double jeopardy claim.

There is ample precedent for the remedy set forth above. Just as police officers, for the most part, were able to learn to inform suspects of their constitutional rights prior to interrogating them after this court decided Miranda v. Arizona, 385 U.S. 436, 86 S. Ct. 1602 (1966), prosecutors can learn to try all charges arising from the same conduct in one proceeding. There is no reason to believe that prosecutors are less amendable to this kind of behavior modification than police officers were.

Because this case was correctly decided in line not only with Grady but with its predecessors, this court should not accept certiorari in this matter. This is not the case to use to revisit double jeopardy analysis,

even in the event that the court at some point should wish to do so. It is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



M. Ruth O'Neill
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CERTIFICATE OF SERVICE

THREE COPIES of this brief were deposited for mailing on this 12th day of February, 1992 to:

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APPENDIX

In the Superior Court of the State of Arizona

In and For the County of Mohave

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. CR-11525
	)	Motion to Dismiss
TIMOTHY PRICE QUINTON,	)	
	)	
Defendant.	)	
	)	

Before the Honorable Leonard C. Langford, Judge

Tuesday, August 21, 1990
11:30 a.m.

Kingman, Arizona

Reporter's Transcript of Proceedings

Appearances:

For the State: Robert Moon
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Reported by: Debra M. Henson, C.S.R.
Official Reporter, Division II

THE COURT: 11525. The record will show the presence of the State by Mr. Moon, Ms. O'Neill, counsel for the Defendant, and you are Timothy Price Quinton; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: This matter comes on for oral arguments on a motion to dismiss scheduled for yesterday, but I was ill yesterday. You may proceed, Ms. O'Neill.

MS. O'NEILL: Thank you, your Honor. Just -- I would just incorporate in my arguments and emphasize a few points from my written motion.

To begin, we do believe that once we have made an offer showing double jeopardy is in issue -- and we believe that we have -- the burden is then on the State to convince this Court that the double jeopardy provisions would not be violated by continuing with this trial.

Just to go through a few things why we -- why we believe that we have met our burden of raising this issue and therefore sending it over to the State, we do remind the Court, as we cited in the motion, to Grady v. Corbin, the new case that came down in May from the Supreme Court, has held that the double jeopardy clause bars a subsequent prosecution if to establish an essential element of the offense charged in the second prosecution the government will prove conduct that constitutes an offense for which the defendant will be --

THE COURT: An essential element of the offense or that the facts that he used to establish the essential element?

MS. O'NEILL: Well, you Honor, either way under this particular set of facts Grady would apply. One of the essential elements of the kidnapping prosecution that Mr. Moon was successful in earlier this summer was the -- or rather the theory relied on under kidnapping, 13-1304 (a) (3), was that the kidnapping was for the purpose of inflicting death or serious physical injury. Mr. Moon talked about Rebecca Lanning's death continuously; that was an element of the kidnapping offense, and he sought to convince the jury that the death was an element of the offense. He argued in his closing arguments that -- to quote Mr. Moon -- he killed her, he killed her, he killed her, he killed her. It's the same circumstances;it's the same circumstantial evidence the State would rely on to introduce the murder case in front of a jury as the State relied on to introduce the kidnapping case. The evidence is the same; the murder prosecution is based on the exact same set of facts. It's the same as in Grady where an element in that case -- it was reversed although there is case law suggesting that the order of prosecution doesn't matter. In the Grady case, a motorist was convicted of driving under the influence and driving left of center and, because there

was a fatality involved in that case, subsequently indicted and tried -- tried for a homicide, which the Supreme Court said you couldn't do that. The Supreme Court was very clear and said that when you're relying on elements in one case to prove the other case that that's double jeopardy.

Brown v. Ohio, which is also cited in my motion, which is I believe briefly mentioned even in Mr. Moon's motion, says that double jeopardy prohibits relitigation of the same facts, and so do the case that was not -- it was not ruled to the contrary in Grady that that's what they were doing.

We're talking about the same situation. We're talking about a prosecution that's barred because they're trying to use evidence from the first conviction in the second conviction. They're going to try and say in the statement of their case that Miss Lanning was abducted by Timothy Quinton and then thereafter she was killed by Tim Quinton using the exact same circumstantial evidence they have used in the first case; the only change is the name of the charges and, of course, the possible penalties the Defendant is facing.

The essential element in the case that Mr. Moon sought to establish to get his kidnapping conviction was that Rebecca Lanning died, and as an essential element of the murder charge is that Rebecca Lanning died; obviously those

things are so closely interrelated that to try him twice would be to try him twice for the same thing. That is the reason we filed the motion.

Once again, as the Bendis case indicates, once we raise the claim, it's up to the State to prove that it's not double jeopardy, which we don't believe the State's going to be able to do, so we also don't believe that there are any reasons why the Court should disregard Grady v. Corbin in reaching its decision.

THE COURT: Okay. Mr. Moon?

MR. MOON: Your Honor, I stated in my response that I will present evidence of a number of things, which on further reflection, there is a procedural history of why the two cases are not consolidated; but unless you Honor feels it's critical to this issue, I have come to the conclusion that it's probably not. It kind of went more to our good faith reason why these charges were not consolidated from the outset.

The crux of Grady v. Corbin -- and I admit that when you read it, it first seems troubled because it seems to do an 180-degree turnabout from the existing law on double jeopardy. However, some of the critical language in that opinion makes it clear that it really isn't that big of a change from the prior law. I've quoted from page 2094 of 47 Cr. L. Reporter. The double jeopardy clause bars any subsequent

prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Well, the kidnapping is not an essential element of murder nor is custodial interference an essential element of murder. Likewise, those acts which are elements of murder are not conduct which constitutes either the offense of kidnapping of custodial interference. The case law for years has acknowledged the fact that there can be substantial overlap of proof in separate prosecutions, and there is no doubt that there would be a tremendous overlap of proof between what we'd present in this case and what we presented in the kidnapping case. However, the bottom line is the -- still the essential elements -- would also go to page 2095 of Volume 47 of the Criminal Law Reporter: This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been prosecuted -- excuse me -- had already been convicted, i.e. if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence because what we had in Grady v. Corbin was a DUI that had already been prosecuted and the State or the government

was stating our theory of this manslaughter is DUI and so the only other element is that the DUI was the proximate cause of the death of the victim. They were asked personally from reading the opinion on more than one occasion well, do you have another theory of your manslaughter besides the DUI, and apparently they never did show any other theory. That is completely different from a case where you have the crime of kidnapping, the crime of custodial interference, which are legally already completed before the murder is committed. I mean a person can kidnap someone maybe with the intent to injure them, maybe with the intent to inflict a sexual offense, or maybe with the intent to kill them, but they can change their mind and release the victim without actually killing them. Likewise, you can commit murder without kidnapping or committing custodial interference of a person. So when you consider the essential element, which has always been the key decision and I submit still is even under the Grady case, you don't have double jeopardy problems.

I also suggested in my response that while there was never a written motion to consolidate, I did make an effort to coordinate such a consolidation through counsel, and the procedural history was that you have the retained attorneys on the kidnapping and custodial interference, and by the time we had

the last bit of evidence, which, you know, turned out to be somewhat inconclusive, but nonetheless we were waiting in hopes of something better, we were almost on the eve of trial. The retained attorneys' position was hey, we got enough money for the kidnap and custodial interference case, we're not going to do the murder. Appointed counsel on the murder case said well, I can't be ready to go to trial on the murder case on June 4, which is just a few weeks away. Nobody seemed to be particularly willing to continue the kidnap to give Ms. O'Neill time to get prepared and then have the three of them represent the Defendant on a consolidated case with all charges. So while it was not on the record and in writing, I would submit that all three defense counsel opposed consolidation of the offenses, and that is an express exception to this double jeopardy rule under Brown v. Ohio, which I've cited in my response.

The last thing I want to touch on is in the event that there is a dismissal, it has to be without prejudice because even under the Grady decision, there is nothing that says well, jeopardy attached to the murder when you started your trial in the kidnapping even though that charge was not pending. What they've said is we don't want to subject somebody to repeated, separate trials out of the same set of events and by doing your trial

on you lesser offenses, you have now lost the right to have a separate trial on the more serious offense. If there are any other trials out of these offenses, it's going to be at his request because he has filed a notice of appeal from his conviction, and the only other trial that would be likely would be in a new trial if his appeal was successful. At that point there has been no constitutional preclusion of trying the murder charge. What Grady may stand for is just having a second, separate trial against his wishes, but if he gets a new trial in the kidnapping by his own choice, there is nothing to preclude us from then refiling the murder charge, consolidating that with the kidnapping charge. I would submit there is no basis under the Grady v. Corbin decision to dismiss; however, if there is a dismissal, it must be without prejudice.

THE COURT: Ms. O'Neill?

MS. O'NEILL: Thank you, your Honor. Once again, I'm approaching this oral argument I guess more to convince you that I'm right when I say that the State has to prove it's not double jeopardy. It looks like that's the order we're going in.

Obviously what the State just said is there's some reason why it's not double jeopardy. The Court could very well find they haven't done that. I would like to address a few things Mr. Moon has said. He's talked about

kidnapping and custodial interference not necessarily requiring a murder and a murder not necessarily requiring a kidnapping and custodial interference. What we're talking about in this case, Judge, and in this case he has a circumstantial set of facts; he's got some things he's tried to weave together and has successfully convinced the jury in a kidnapping case about what his position was, and those essential set of facts that he has to use are that a girl disappeared, she was last seen by -- in the company of Mr. Quinton by her family, and she died. Those are the facts. They haven't changed.

Mr. Moon made a big show about talking to us in private, not necessarily on the record; I don't know what he did on the record about well, when I get my FBI lab results back, I'm going to convict him, I'm going to indict him for murder; and his FBI lab results came back and didn't say anything. Perhaps to save face, make sure everybody knew he meant what he said, he did indeed get an indictment on the first-degree murder charge. He didn't have any other evidence.

In his procedural history he talks about things that happened. Everything he talks about happening under his fact heading are things that he litigated in the kidnapping case, and both Vitale which is at 447 U.S. -- I don't have the page cite -- or 65 L. Ed. 2d 228, a

1980 case, the Court held in order to prove the charges in the later case, the State must prove conduct for the crime for which the defendant's already convicted, double jeopardy bars related prosecution. Also in Brown -- Mr. Moon also indicated at State -- in Brown v. Ohio, 53 L. Ed. 2d 187, a 1977 case, at page 196, sequence of prosecution is immaterial, doesn't matter whether the first case was a conviction on the greater or the lesser charge. The issue is what are the facts of the case, what, given those facts, are the elements of the offenses, and how was one case proven, how do they seek to prove the second case. That's the main thrust of the protections of double jeopardy -- double jeopardy protection. Of course, the one here -- this is the one about multiple punishments -- North Carolina v. Pearce, of course, says double jeopardy clauses also protect second prosecution after acquittal and against second prosecution after the same offense after conviction and protection against multiple punishments for the same offense for the same conduct. This is a situation where conduct is the same, the evidence is the same. Mr. Moon --

THE COURT: Excuse me. Conduct is the same?

MS. O'NEILL: The conduct the State seeks to prove is the same.

THE COURT: Well, did they have to prove the death to get the conviction the last time?

MS. O'NEILL: With the facts of the case, the way they -- Mr. Moon's theory was the kidnapping was a kidnapping because Rebecca Lanning died, and --

THE COURT: Did they have to prove that fact that she died in order for the jury to reach a verdict of guilty on the kidnapping?

MS O'NEILL: In this particular case the did, Judge, because there was no evidence about any -- that they could point out showing a physical injury or any other kind of injury. There was no evidence whatsoever about involuntarily servitude. There's no indication of any ransome being requested, a shield or hostage taking situation. There was no reason to suggest that under the facts of the case that Lanning was kidnapped to place either herself or a third person in reasonable apprehension of imminent physical injury or to interfere in the performance of a governmental or political function. The only thing we had was a dead body. Obviously the dead body was very persuasive to that jury; that's what the kidnapping charge hung on in this particular case under these particular facts. It wasn't the facts -- the death was an element of the kidnapping.

Mr. Moon talked briefly and I would like to respond briefly to the fact that -- he talks about the fact that consolidation was opposed by the parties. I wasn't appointed to this case

until -- I believe it was ten days before the firm trial date, which was already set. I did talk to Mr. Moon once I think before the arraignment at which I was officially appointed, discussing the possibility that I might be appointed, but that would give me either ten days to try a murder case, virtually writing in ineffective assistance of counsel to the scenario if Mr. Quinton was convicted or forcing Mr. Quinton to waive double jeopardy. That is just not something that's fundamentally fair. It's fundamentally unfair to suggest that ten days is an adequate length of time to prepare for a murder case.

I did have some disclosure on this case because for a couple of months I represented Mr. Quinton on the kidnapping charge before retained counsel entered the picture, but they had over 350 more pages of State disclosure that I didn't have and wouldn't have been entitled to until after the trial started. Due process would require under Mr. Moon's argument that we waive double jeopardy. It would require the same outcome because it would be impossible for Mr. Quinton to get a fair trial on the murder charge if we would have gone forth to trial on June 4; it just couldn't have happened. It's interesting that Mr. Moon's suggestion that there was some kind of waiver there under these facts of this case when there was no way that -- my understanding at least

was that this retained counsel, one of whom was from the other side of the country, had made plans, this was a firm trial date. I was going to last a couple of weeks at least, in fact lasted into parts of three weeks. This wasn't a trial date that was tentative; this was a firm trial date, and -- I don't know -- I think Mr. Moon even mentions in his motion -- response to the motion that subpoenas were already out. This is not a situation where joining these cases would solve the problem in the least because we're looking for either outright ineffective assistance of counsel or a double jeopardy problem.

Mr. Moon could have sought an indictment in October for first-degree murder if he thought he had the proof then; his proof didn't change. In the Jeffers case that he cites as some support of -- the support for his suggestion that we're not entitles to raise a double jeopardy issue, Jeffers had an opinion that was -- on this issue that -- there were only four justices that joined; it wasn't a majority opinion, but it did talk about whether double jeopardy applied when a victim opposed the consolidation --

THE COURT: A victim opposed?

MS. O'NEILL: When a defendant opposed consolidation. That case, however, dealt with two indictments that came down on the same day and, as I said, only four justices joined in

that opinion; not sure it has the force of precedent, but the facts in that case were completely different, and it's not a situation like the situation we have here where defense counsel is just appointed and could either go to trial ten days later on a first-degree murder charge, thereby ensuring the case was going to come back anyway or be able to raise a double jeopardy claim.

Grady doesn't really turn the law upside down, on its face, or whatever other part of its anatomy it may have if it was a person. Mr. Moon's right about that, but Vitale and Brown predate Grady v. Corbin, and they have the -- they suggest the same order of things. Grady v. Corbin -- in that case the Court affirmed the prior discussion in Vitale, which didn't have anything to do with the bill of particulars, suggesting that was in fact the correct statement of the law.

We believe that under the facts of this case with the exact same evidence being presented at both trials, with the exact same force being put forth by the prosecutor in trying to convince a jury to convict Mr. Quinton because of a dead child, which is -- obviously was very forceful in the prior trial, that it's obvious that this is a case where Mr. Quinton in being placed in jeopardy because of the same conduct, because of the same offense, and we believe we've more than raised ample

suggestion and put forth ample reasons why the State should be required to convince the Court that it's not the case.

THE COURT: Ms. O'Neill, couple of questions I have. On page three, lines three to 17 of the response to motion to dismiss, which was filed 8-13 of '90, Mr. Moon sets out certain facts. With regard to the -- those matters that pertain to you, I understand from what you're saying you're in agreement with his recitation; is that correct?

MS. O'NEILL: As far as I know. I don't have any idea about any order signed by this Court.

THE COURT: No, no, page three.

MS. O'NEILL: Page three?

THE COURT: Lines three to 17.

MS. O'NEILL: I don't know if there was any effort to reach an agreement. I got a phone call about five o'clock one afternoon after the indictment was returned.

THE COURT: From what -- your statement that you certainly weren't ready to go to trial, could you have been ready to go to trial on a consolidated case on June 4?

MS. O'NEILL: No way. I didn't even have the 350 pages of discovery.

THE COURT: From what I understand, Mr. Floyd -- he's the gentleman from across the country you were referring to -- he was

somewhat locked in a firm trial date of June 4; is that true?

MS. O'NEILL: That is my understanding.

THE COURT: Your understanding was he and his local counsel, Mr. Wilkinson, were retained only to represent on the case that was actually tried June 4 and wouldn't be representing Mr. Quinton on the trial on the murder case; is that correct?

MS. O'NEILL: Yes.

THE COURT: With regard to Mr. Moon's statements as to what steps he took before getting a murder indictment, you know, before presenting the case to the Grand Jury, do you have any reason to believe that that is inaccurate?

MS. O'NEILL: I'm not sure I understand, Judge.

THE COURT: Well, he says the reason he didn't present the case to the Grand Jury for the murder in an attempt to get a murder indictment, he was waiting for some results from examination by the FBI. Do you have anything to indicate that that's why he held off on taking the case to the Grand Jury on the murder matter?

MS. O'NEILL: Well, I understand that that is correct; however, I also understand that he didn't get anything out of the FBI results.

THE COURT: Right, but I mean he was waiting to get some more evidence he wanted to

have before he presented the case to the Grand Jury on the issue of the murder.

MS. O'NEILL: But the other evidence was never there.

THE COURT: Do you have anything to indicate that was his motive or reason -- anything to indicate that that was not his motive or reason for waiting to present the matter to the Grand Jury on a possible murder?

MS. O'NEILL: Your Honor, I wasn't representing Mr. Quinton on this matter at that time, and I don't have any knowledge one way or the other. I don't imagine he had any -- I don't have anything that says he's not telling you the way it was.

THE COURT: Being candid, he was waiting to get the results of an FBI examination that -- that might present the State with some more evidence that was useful.

MS. O'NEILL: No, I don't have anything to indicate otherwise.

THE COURT: So then as you are understanding, what could he have done with regard to this case?

MS. O'NEILL: Well, you Honor, since he didn't get any more information, he could have just not indicted for murder, not tried to take the case for a murder indictment. He didn't have any further evidence.

THE COURT: You got enough at least to get the Grand Jury to believe there was probable

cause that your client committed the offense. So once he got the indictment for murder, then what does he do? He can't go to trial on June 4. What he would have to do is consolidate the two trials, which apparently Mr. Quinton warrants to argue. With regard to the two attorneys, apparently they say they didn't want to delay it.

MS. O'NEILL: Well, you Honor, I'm not the one who makes the decision about what cases go to the Grand Jury; that's up to the prosecutor in his discretion. Because of the fact that he didn't submit anything else to the Grand Jury by way of intent or further proof or further evidence of a murder being committed and probable cause to believe Mr. Quinton committed it other than what was in the indictment on the kidnapping case, he had the option of going forward at that time to try and seek a murder indictment; he didn't do that, and --

THE COURT: But at that time he didn't know.

MS. O'NEILL: I don't know why he didn't do that. It was the same. The evidence presented to the Grand Jury was substantially the same on both occasions, and I don't know what causes the prosecutor in his discretion -- and we all know the prosecutor has a lot of discretion to present some charges and not other charges -- but he presented and he chose to present last fall a kidnapping and custodial

interference case to the Grand Jury, but he used the same evidence when he chose to present the other to the Grand Jury. I don't know why he used his discretion the way he did, but I -- you know, my client doesn't get a say in how things are presented to the Grand Jury, so I don't know that it's appropriate to try and have the defense second guess the reasons for the prosecutor's motives.

THE COURT: Okay. Mr. Moon, I had a question. Do you agree that your evidence at the murder trial will be basically a replay of the evidence at the other trial?

MR.MOON: It would be a lot of replay; however, some of the things that were precluded in the kidnapping trial I would hope to be able to get admitted into the murder trial. In addition, there was some new information we received about halfway through the kidnapping trial about a statement allegedly made by the Defendant, and in fact I had rested when the information came to my -- came to me and I would have had to try to reopen my case in chief to present this; and that again turned out to be maybe not as crystal clear as it was initially reported to me -- seems like everything in this case has been that way -- but there would be -- just about everything I presented in the first case would be presented again, and hopefully there would be some additional evidence. One other procedure --

THE COURT: Just a second. The items you said were precluded, these are matters you wanted to present at the kidnapping trial, and so it sounds like it's just evidence that you used at the kidnap trial would be the only evidence that would be presented at the murder trial plus in addition evidence that you tried to get in at the kidnapping trial but couldn't. Doesn't sound like you'll have anything different in the way of evidence than what you used or wanted to use in the kidnap trial other than the --

MR. MOON: Other than the one item that came to my attention after I had rested.

THE COURT: That's something you wanted to use at this -- at the kidnapping trial but it was too late?

MR. MOON: It was too late. Of course, I didn't know about it until it was too late, that's correct.

THE COURT: So the scenario that this murder trial, if it goes on, is going to be the same as last time except the judge just goes through and pulls out the -- puts in a murder instruction, takes out the one defining custodial interference and kidnapping.

MR. MOON: Well, that would be close to an accurate description, that is true, you Honor. The evidence that was precluded at the first trial was precluded because it pertains more to a murder charge, and Judge Pope ruled that it

would be too prejudicial in a case where he was not charged with murder. That was -- it wasn't for any search and seizure issues or anything along those lines.

THE COURT: Why was it that you didn't move to consolidate or get some agreement on the record from Floyd, Wilkinson, and O'Neill that going to trial wouldn't be double jeopardy?

MR. MOON: Your Honor, I talked to the attorneys. It was in a timing frame where I had filed a motion to consolidate, it would have almost by necessity caused a delay of the trial, the kidnapping trial. I felt certain that I wasn't going to be able to accomplish consolidation because among other things the 13th Amendment would preclude retained counsel from being forced to represent the Defendant in the murder charge, so if I knew -- I -- I felt strongly I wasn't going to be able to get the charges consolidated. There was a firm trial date, a number of people were subpoenaed, Mr. Floyd had made travel arrangements; I felt that to cause another what would have probably been brief delay would have wreaked havoc with my presentation and my getting witnesses from a number of different states besides Arizona, and I just chose not to do that for tactical reasons. Then, of course, not knowing that Grady v. Corbin was about to be decided, I thought the law on double jeopardy was pretty

clearly the identical element test, and I just didn't foresee this problem from arising.

THE COURT: I assume the Court could have appointed Mr. Wilkinson as Court-appointed counsel; I know in the past Mr. Wilkinson has acted as Court-appointed counsel.

MR. MOON: Well, your Honor, the problem with that would have been that it was crystal clear that his role in the kidnapping trial was just to basically sit there as local counsel so Mr. Floyd can try the case, and Mr. Wilkinson did argue some matters in chamber, but he did not actively participate in the trial in the sense he didn't do any opening statement, he didn't examine any witnesses, and he didn't do any closing argument; so his position was he had been paid only enough to kind of be the local representative to --

THE COURT: Warm body.

MR. MOON: To enable Mr. Floyd to try the case; that's in -- that's true. In fact, regarding Mr. Floyd's willingness to continue in the murder case, he didn't even appear for the judgment and sentencing; Mr. Wilkinson did handle that portion of the case by himself.

THE COURT: Thank you very much. I'll take the matter under advisement. I'll let you know of my decision as soon as possible. Stand at recess. Ordered affirming prior custody orders.

(The proceedings were concluded.)

Certificate of Reporter

I, Debra M. Henson, Official Reporter in the Superior Court of the State of Arizona, in and for the County of Mohave, do hereby certify that I made a shorthand record of the proceedings had in the foregoing entitled cause at the time and place herein before stated;

That said record is full, true, and accurate;

That the same was thereafter transcribed under my direction; and

That the foregoing typewritten pages constitute a full, true, and accurate transcript of said record, all to the best of my knowledge and ability.

Dated this 19th day of September, 1990.

/S/

Debra M. Henson, C.S.R.